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WEDNESDAY, SEPTEMBER 29, 2010

United States Senate,
Committee on Rules and Administration,
Washington, D.C.
Committee on Rules and Administration

The Committee met, pursuant to notice, at 10:00 a.m., in Room 301, Russell Senate Office Building, Hon. Charles E. Schumer, chairman of the Committee, presiding.

Senators Present: Schumer, Dodd, Durbin, Udall, Goodwin, Bennett, Alexander, and
Roberts.

Staff Present: Jean Bordewich, Staff Director; Jason Abel, Chief Counsel; Veronica Gillespie, Elections Counsel; Adam Ambrogi, Administrative and Legislative Counsel; Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Lynden Armstrong, Chief Clerk; Jeff Johnson, Staff Assistant; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman Schumer. The hearing will come to order. And I want to thank everybody, including my friend Bob Bennett, for participating in this hearing. It is the sixth and final in our

27 series of hearings to examine the filibuster.

28 Over the course of these hearings we have looked at a number of issues: The
29 development of the filibuster since the earliest days of the Senate; the growing challenges that
30 the use --and abuse-- of the filibuster presents to the Senate; and the impact of the filibuster on
31 nominations and other matters.

32 Our hearing in July examined filibuster- related legislation introduced by Senators Frank
33 Lautenberg of New Jersey and Michael Bennet of Colorado. Last week we had a hearing of
34 the proposals sponsored by Senator Harkin and our Committee member Senator Tom Udall.

35 These hearings will hopefully inform some of the discussions at the beginning of the
36 next Congress. While the membership of the Senate will change, problems posed by the
37 abuse of the filibuster are not going away.

38 This week, I would like to turn to some every interesting ideas that have been proposed
39 over the last few decades but have not yet been a focus of our hearings. We have had focus
40 on some of the ideas, but not all.

41 These ideas have been promoted by members of both parties. We have already heard
42 testimony in previous hearings on ideas to limit debate on nominations, whether they be
43 judicial or executive.

44 Now, first, motion to proceed.

45 And I want to welcome Senator Dodd here.

46 The first idea concerns limiting debate on the motion to proceed. The motion is

intended to be a procedural step that allows the Senate to begin consideration and debate on a measure, a substantive piece of legislation. However, far too often in today's Senate is the decision to begin debate itself is filibustered. This does not encourage serious debate and deliberation-- it blocks it.

The motion to proceed was not covered by Rule 22, the cloture rule, when it was first adopted in 1917, because cloture then was applied only to legislation, not to procedural motions. In 1949, however, Rule 22 was expanded to include most procedural motions, and the motion to proceed for the first time became subject to cloture except on rules changes. In 1959, Rule 22 was again expanded to apply cloture also to ending debate on motions to proceed on changes to the Standing Rules.

In the decade since, leading Senators of both parties have tried to further limit debate on the motion to proceed, so the Senate could move on to the real business at hand. Most noteworthy, in the 1980s, Senators Robert Byrd and Ted Stevens, obviously a bipartisan effort, both Leaders and members of this Committee, introduced resolutions to prevent filibusters on the motion to proceed by limiting the amount of time the Senate could spend debating it. Senator Byrd already had tried that once before in 1979 as a Majority Leader, and of course as an expert on Senate procedures.

In 1984, the Temporary Select Committee to study the Senate Committee system recommended a two-hour limit on debate for a motion to proceed. Its rationale was to: "ensure that unlimited debate is permitted only on substantive issues." That is something we

67 are still talking about today.

68 As use of the filibuster has escalated, it is being used increasingly on the motion to

69 proceed by both parties when they have been in the Minority. This chart shows it all.

70 [Chairman points to chart.] And as you can see, in 2007 to 2008-- that is the last full session of

71 Congress--the number of cloture votes on the motion to proceed skyrocketed. Let us see

72 here. It more than doubled any previous year.

73 The way we operate today, the Senate rules basically provide Senators with two bites at

74 the filibuster apple before a Bill can even get to a vote on the floor. It is fair to ask whether

75 this is overkill. Even the most obstructionist-minded Senator only needs one filibuster to

76 block a Bill they oppose.

77 The frustration with filibusters on the Motion to Proceed can prompt a Majority Leader

78 to file cloture sooner and more frequently and with less time given for amendments. The effect

79 of being able to filibuster the same Bill twice can be to launch a procedural arms race that

80 thwarts efforts to debate, improve and pass legislation.

81 The second issue we will look at is post-cloture time requirements. And I am going to

82 take a little more time today with the indulgence of my colleagues, because we have so many

83 issues before us, and I want to lay them out. And I will give Senator Bennett equally more

84 time if he wishes.

85 The second type of proposal we will examine today are those that offer greater

86 flexibility during post-cloture time. Currently, after cloture is reached, there are 30 hours of

87 time allocated for debate prior to voting on final passage. Each Member has up to one hour,
88 though clearly not all one hundred Senators can take a full hour before the 30-hour period
89 expires. Too often, we do not have substantive discussion, or consider amendments on the
90 Senate floor during these 30 hours--we are just "burning the time." We have all seen the
91 empty floor as we wait until the clock expires.

92 Changes that would make better use of post-cloture time, or reduce it if there is not
93 much real debate, have been proposed over and over, for many years. As one of his many
94 recommendations to change the Standing Rules, Senator Byrd introduced resolutions several
95 times during the 1980s, as did Senator Stevens, to reduce the total hours of post-cloture time
96 or to move more quickly to a vote on final passage if Senators have finished real debate.

97 The next issue we will look at is filibusters on going to Conference. In an ideal world,
98 Conference Committees allow the House and Senate to work out differences in a negotiated,
99 bicameral manner that results in the best possible legislation. I remember from the days I was
100 in the House, the "joy" of being on a Conference Committee on major pieces of legislation,
101 even as a newer member in the House, and having a real back-and-forth, and not knowing how
102 the legislation would turn out. The coalitions develop as the amendments are introduced. It
103 almost always was bipartisan, at least on the Committees that I was on, and even here in the
104 early years of the Senate.

105 But this "joy" is sort of not available to newer Senators. Why? Because Conference
106 Committees are actually on the verge of extinction. And abuse of the filibuster may be to

107 blame.

108 Here is this chart. [Chairman points to chart.] It shows that while reasons can be hard
109 to pinpoint exactly, there has been a real decrease in using Conference Committees to reconcile
110 differences in recent years. This is the number of times that--I am going to hold it up.

111 This is the number of times that the Conference was used. As you can see, it is at a
112 real all-time low in the last full Congress, 2007-2008. This is the percentage of laws where
113 Conference Committees were used, two percent.

114 One reason, many believe, is that threats of filibusters have made it a lot harder to
115 agree to a Conference and appoint conferees.

116 In the history of the Senate these three actions--one, ask that the Senate insists on its
117 amendments or disagree to the House amendments to the Senate Bill; two, request a
118 Conference with the House; and three, request that the Chair be authorized to appoint
119 conferees-- are usually agreed to, or have usually been agreed to, by unanimous consent.

120 However, debate-- and thus a filibuster-- is permitted on each of these three
121 actions. If the Senate has spent two to three weeks on a controversial Bill, a reasonable
122 Leader might seek to avoid Conference filibusters because they take a long time. That is when
123 we see the so-called ping-ponging of Bills between the House and Senate. Or other strategies
124 designed to pass a Bill without going to Conference.

125 And on this one I think, at least my view from my 30 years experience on both
126 the House and Senate sides, is that Minority Senators whether in the House or Senate have a

127 much greater ability to shape legislation when there are Conference Committees.

128 The need to streamline the process of going to Conference is also not new, but I
129 believe it has become more urgent. We will hear from our witnesses today about several
130 ideas to eliminate or limit the filibuster that have severely restricted the use of Conference
131 Committees.

132 Another issue we will address is “filling the amendment tree”. I know this is an
133 issue that has vexed many members on the Minority side, or many members when they are in
134 the Minority, whatever party they are a member of. And I know Senator Gregg will talk a lot
135 about that today, and we welcome him here for that.

136 Under Senate procedure the presiding officer of the Senate acknowledges the
137 Senate who first seeks recognition. By precedent the first Senator recognized is the Majority
138 Leader. So under Senate procedures, a Senator may offer amendments to a pending Bill in
139 the order in which he or she is recognized. This allows the Majority Leader to offer a certain
140 number of first-degree and second-degree amendments to the measure up to the maximum
141 possible. This creates what is called the “amendment tree”.

142 Once the maximum number of amendments has been offered by the Majority
143 Leader, no more are allowed, and the “tree” is considered “filled”. Depending on the floor
144 situation, the tree may be filled with as few as three or as many as eleven amendments. The
145 effect of filling the tree is that no member can propose any further amendments to that
146 measure without consent. Which in most all cases means-- no new amendments.

147 How is this procedure tied to the discussion about the filibuster? Well, when a
148 Majority Leader fills the tree, other members are prevented from submitting their own
149 amendments. Filling the tree also gets around "filibuster by amendment," where the Minority
150 Party uses the amendment process to keep offering amendments in the first and second degree
151 with the intent of killing the Bill.

152 Members of the Minority Party--of course, that only happens if the tree is--that only
153 occurs when the tree is filled later, not when it is filled immediately. And members of the
154 Minority often argue that filling the tree eliminates an opportunity for substantive change or
155 improvement to the legislation. The Majority, by contrast, often argues that filling a tree is
156 actually a way to get a vote on a Bill or prevent obstructionism by amendment.

157 But it certainly gets in the way. I mean, when I first got here, people said, the power of
158 the Majority is to set the agenda, the power of the Minority is to offer amendments that would
159 put the Majority on the spot or question their agenda. When we fill the tree, of course, that
160 does not happen.

161 So today we are looking at hearing, as I mentioned, from our colleague Senator Gregg.
162 He will be leaving the Senate at the end of the year, and I think I can speak for every member of
163 this panel and say, "to all of our regret," and probably not to his.

164 Senator Gregg, last week, during last week's hearing, I mentioned the colloquy you had
165 with some of our Republican colleagues on the Committee on the Senate floor following the
166 failed cloture vote on the Defense Authorization Act. During that colloquy, you described the
167 frustration on your side of the aisle. And I think it is fair to say you are not alone. There is a
168 frustration on both sides of the aisle, and I hope these hearings and testimony such as yours
169 will move us toward meaningful reform. So we thank you for testifying before this Committee
170 about your thoughts about Senate rules and procedures related to the filibuster, filling the tree,
171 and sharing with us your experience and insights.

172 Senator Bennett.

173
174 **OPENING STATEMENT OF SENATOR BENNETT**

175 Senator Bennett. Well, thank you Mr. Chairman. I think you have laid out the past
176 history very well. And rather than prolong the hearing, I will simply stipulate that your charts
177 are accurate. And look forward to hearing from our witnesses.

178 Now I will reserve perhaps a little more time later on when we get into the give and take
179 of the question period. But I understand Senator Dodd wants to speak, and has to go to
180 another assignment. So I will defer now, and be available a little later on if things require a
181 steady hand to straighten out some misconceptions that might arise.

182 Chairman Schumer. Your hand is always steady in these matters Senator Bennett and
183 we appreciate it. Senator Dodd has to leave.

I know has given a lot of thought to these issues, because we have discussed them. So would it be okay with the Committee's consent, I would like to recognize Senator Dodd.

Senator Dodd. Well, I thank you Mr. Chairman. I will be brief.

Chairman Schumer. Only Senator Durbin objects.

Senator Durbin. I withdraw.

Chairman Schumer. He has withdrawn his objection.

OPENING STATEMENT OF SENATOR DODD

Senator Dodd. Well, I will try and be brief with my colleagues. Thank you Mr. Chairman. It is Bob Bennett and I and Judge Gregg all days away from departing the Senate. I have enjoyed my tenure on this Committee over the years. The work of the Committee, we have had some raucous meetings in this room over the years on various matters that have come before the Rules Committee. And I chaired the Committee for a while, including when we passed the Help America Vote Act, that Mitch McConnell and I wrote back a number of years ago.

And I apologize for not having been here for a good many of the hearings you have had on this subject matter, since my Banking Committee responsibilities kept me from attending. And I commend you Mr. Chairman for exploring this issue as much as you have.

I recall back in the snowstorms of this past winter there was a reporter for the Washington Post who wrote and talked how Washington had been immobilized by snow, and

204 then went on to say this is highly unusual, normally Washington is immobilized by Senators, at
205 the time. And that probably reflects the views of an awful lot of people in the country.

206 Chairman Schumer. Senators do not melt.

207 Senator Dodd. No, you do not melt, that is true. Well there has been a lot of truth in
208 this. And there is a serious conversation going on about how we address these procedural
209 issues in the Senate, and the problem of endless delays of legislation. A conversation among
210 those both outside the body and within it who have been observers of the Senate during their
211 careers, including Norm Ornstein who you will hear from later this morning, and others who
212 have been talking about this.

213 And I regret that my other Committee assignment's obviously made it hard for me to
214 participate in this debate along the way. Because I do have some strong views on it after 30
215 years in this body. And having been an observer of it for longer than that, as both I and Bob
216 Bennett and our parents served in this institution. I served as a page back in 1960, and so I
217 have almost 50 years of being around this building over the years, and watching the Senate
218 operate. It had great days and less than great days in its performance of its duties.

219 And obviously we have been hearing some wonderful people. I mentioned Norm
220 Ornstein obviously who we know and appreciate immensely. Thomas Mann. Experts from
221 the Brennan Center. Obviously Senator Byrd. People like Senator Gregg, Don Nickles and
222 others who have come before us and shared your views on this subject matter.

223 But as Senator Byrd so eloquently reminded the Committee when he testified, prior to

his death in June, the Founders intended the Senate as a continuing body that allows for open and unlimited debate, and the protection of Minority rights. Minority rights. And he noted that our system established a necessary fence, to use Madison's words, as the principle author of the Constitution, against the dangers of fickleness, to quote Madison, and of the temporary passions of our public life.

He observed that that fence is the United States Senate. Now I recognize the source of my colleagues' frustrations. I have heard it in our meetings, caucus meetings, cloakrooms, on the floor of the Senate, and in private conversations. I have heard it more importantly for years among the people of our country, who are sometimes angry and frustrated that the Senate often appears to be tied up in procedural knots when we should be focused on moving the country forward. A time like this certainly is evidence of that.

It is true that during this Congress, the Minority has threatened to filibuster almost every major proposal for Senate consideration, including the two largest and most substantial measures that we have considered over the last two years. That is of course the Healthcare Reform Bill and the Financial Reform Bill.

And I note that it was only after Majority Leader Reid explicitly threatened to keep us in around the clock that eventually we were able to proceed and act on the Wall Street Reform legislation.

On items large and small, the Minority has either threatened or acted to block legislation that we put forward. And I have been a frequent critic of such unnecessary delays

244 and such abuses of the rules. But Mr. Chairman, I do not believe the answer to this problem
245 necessarily lies in lowering the 60-vote threshold to break the filibuster. I know there are a lot
246 of other issues which you are going to discuss, but the fundamental question, whether or not
247 we ought to lower that number, is something I have strong reservations about and would
248 strongly oppose.

249 Even after a series of sequential votes, which lowers the threshold each time, or an
250 otherwise fundamental altering of the structure of the filibuster rule itself. I'm not sure what
251 the right answer is. It may lie in forcing actual filibusters rather than allowing the hint of a
252 filibuster to rule of the day. It may lie in eliminating debate on the motion to proceed
253 altogether, or in scaling back the time required for debate on cloture or on the motion to
254 proceed.

255 It may and I think certainly does lie in exercising greater discipline in the way each
256 United States Senator, those of us who have been privileged, a small number out of more than
257 two centuries of Americans, who have had the privilege to come here and serve here, in how
258 we apply and use the rules that we have been given, often to our own advantage.

259 On the last point, there is clearly considerable room for change. I find abuses, the way
260 I have seen in recent years, on holds placed on confirmation process, and holds placed on
261 uncontroversial items, to be used as leverage elsewhere on opposing virtual requirement that
262 anything we try to do of any significance requires 60 votes. These tactics, run contrary to every
263 Senator's duty to act in good faith as members of this body.

264 There are many ideas put forth by my colleagues about what we should do to address
265 these problems and abuses. But I stand with our late colleague, Senator Robert Byrd of West
266 Virginia, when it comes to measures designed to eliminate or substantially limit the basic
267 structure of current filibuster rules. I think would be unwise to change the current filibuster
268 rule threshold and limit the rights of the Minority to leverage important changes to legislation
269 brought forth by the Majority. That is a right crucial to this institution. And we should
270 exercise great, great care, when we consider any changes to it.

271 During the course of my 30 years, three decades, in the Senate, I have served both in
272 the Majority and the Minority. I have served in every imaginable configuration with Chief
273 Executives. And I caution my colleagues on my side that it was not long ago that we exercised
274 the filibuster or holds -- more discriminatingly, I believe, more carefully than it is true today --
275 on matters we thought of such import, of such great historic moment, where we made the
276 judgment that we needed to use those tools to protect our rights within the Minority.

277 For example, it was just ten years ago that we exercised the filibuster to combat the
278 Estate Tax, an extension of the Tax Relief Act of 2006; on an extreme version of the US Patriot
279 Act reauthorization; and a similarly extreme version of the FISA legislation that threatened
280 America's fundamental civil liberties. The Federal Marriage Amendment, to amend the
281 Constitution to define marriage within its text. An extreme and unwise version of the Patients
282 First Act of 2003, part of the Medical Malpractice Reform Bill. And the ill-advised Energy
283 Policy Act of 2003. All major measures that we were able to stop, slow, or in some cases,

284 force changes to using the filibuster.

285 So Mr. Chairman, let me again thank you for doing these, having these hearings. I

286 think they have been very enlightening and worthwhile as we go forward.

287 For over two centuries, the Senate has been the bulwark within our democratic political

288 process of Minority rights and the freedom of speech. It has been the only institution in many

289 ways that provides that unique opportunity.

290 And I would hope that my colleagues, and those who will come after us here, as

291 guardians of this institution and its rules and procedures, which have made such a unique

292 contribution to our Constitutional process, would operate with great caution, no matter what

293 their frustrations, and I know they are deep, and we all feel them. But we bear a higher

294 responsibility to this institution and the future of it, by guarding the very principles that allow

295 for that Minority voice to be heard, to be having the time to express itself. And I worry deeply

296 that we may change that in such a way that the Senate would lose the essence of its existence.

297 So with that, Mr. Chairman, I thank you very much for allowing me to share these few

298 thoughts.

299 Chairman Schumer. Senator Dodd, as usual, your statement is thoughtful, and

300 intelligent. And you speak your mind, and I just want to thank you for your many years of

301 service to this Committee, as Chair, as ranking member, and as member.

302 Senator Dodd. Thanks.

303 Chairman Schumer. And without objection, what I would like to do now is call on

304 Senator Gregg, let him make his statement. As you can see, even though we just had two
305 Democrats speak, we had different views.

306 I said to Senator Bennett, Senator Dodd might have well represented the Minority,
307 whatever party it might be, on his view on this issue.

308 Senator Dodd. I see Marty Paone as well here, and I apologize. Marty, I knew you
309 were going to be a witness, I did not see you sitting there. Thank you for your service here as
310 well over the years.

311 Chairman Schumer. Thanks Chris. So what I would like to do with the Committee
312 members' indulgence is call on Senator Gregg. There will not be, as usual, there will not be
313 questions of Senator Gregg. But when we go to the Second Panel, if people want to make a
314 few minutes of opening statements, it will not detract from their time. Is that okay with
315 everybody?

316 Okay. Good. Then we will move on to Senator Gregg. Your entire statement will
317 be read into the record. And welcome here.

318

319 **STATEMENT OF THE HONORABLE JUDD GREGG, UNITED STATES SENATOR**
320 **FROM THE STATE OF NEW HAMPSHIRE**
321

322 Senator Gregg. Thank you Mr. Chairman, thank you for your kind comments. And let
323 me associate myself with Senator Dodd, as I often do, because I agree one hundred percent
324 with his opening statement, and think it was an eloquent recitation of the importance of the

325 filibuster and the rules of the Senate in protecting the Minority.

326 I was asked to speak today a little bit about a number of issues dealing with this and my
327 perception of them. I appreciate it and am honored at the chance to talk about it. But
328 everybody at this dais knows as much as I know about this issue. And you have certainly been
329 studying it.

330 So let me just reflect both in historical terms and on a personal experience level why I
331 think this is so critical. You know, this Committee's taking up a rules issue, but what you are
332 really taking up is the Constitutional structure of the greatest government ever created in
333 history. We are the freest, the most prosperous, the most extraordinary nation in the history
334 of the world. And we are that was because we have a constitutional government that has
335 given us the freedoms and the prosperity that we benefit from.

336 And I happen to believe that at the center of that constitutional government is the
337 Senate. Some would argue of course it is the House, because they have the ability to initiate
338 appropriations and tax policy. But I do not believe it. I believe that it is the Senate because
339 the Senate is where the rights of the people of this nation are protected. Especially Minority
340 rights.

341 It was created for that purpose when Madison and Randolph were thinking of how do
342 you where going to structure this government I am sure they had in mind the parliamentary
343 systems that they had seen in Europe. The fact that they move too quickly and that they
344 trample the rights of the minorities. And so they setup this structure of checks and balances

345 which is throughout our system, but the ultimate check was and is the Senate of the United
346 States.

347 It has been expressed in a lot of different ways but let me just read a few because I think it
348 is important to go back to the folks who have made a difference in this body, and who
349 understood the body with more depth than I do. And I would say this. I am leaving the
350 Senate as is Senator Dodd and Senator Bennett. I do not leave in a disgruntled way, just the
351 opposite. I am a tremendous admirer of the Senate as an institution, and the people who
352 serve it.

353 I just think I have had the chance over my 18 years to come in contact with some of the
354 best most committed people that I have ever come across in my walk of life. They are just,
355 there are a lot of special people here. Both Senators and Staff who are committed to doing
356 what is right. Well we have philosophical differences, quite a few. But as a very practical
357 matter, this is the place where good people come to try to make this nation better.

358 So let me read a couple of quotes that I think really capture the essence of the purposes
359 of the Senate. And we will begin with Webster, who of course was from New Hampshire,
360 although he represented Massachusetts in the Senate. "This is a Senate of equals, of men of
361 individual honor and personal character, of absolute independence. We know no masters, we
362 acknowledge no dictators. This is a hall for mutual consultation and discussion."

363 And then the other member of the triad, Clay. "The Majority ought never to trample
364 on the feelings or violate the just rights of the Minority. They ought never to triumph over the

365 fallen, nor make any but temperate and equitable use of their power.”

366 And then the third member of the triumvirate of great Senators, Calhoun. “The
367 government of the absolute Majority instead of the government of the people is but the
368 government of the strongest interests. And when not efficiently checked, it is the most
369 tyrannical and oppressive that can be devised.”

370 And then another Senator who should be in the triumvirate. “It is the Senate where
371 the Founding Fathers established a repository of checks and balances. It is not like the House
372 of Representatives where the Majority Leader or the speaker can snap his fingers and get what
373 he wants. But the reason we do not always work by the Majority rule is very simple. On
374 important issues, the Founding Fathers wanted, and they were correct in my judgment, that the
375 slimmest Majority should not always govern when it comes to the vital issues that is what they
376 want.” That was Senator Schumer.

377 You can go on and read Byrd, or read Howard Baker, or read Lyndon Johnson, or Harry
378 Reid. They all came to the same conclusion, the Senate is about protecting the rights of
379 Minority. And at the essence of protecting the rights of the Minority is the filibuster rule.

380 Now, I was asked to speak a little bit about the filling of the tree. The tree, as was
381 explained very accurately by the Chairman, the filling of the tree basically cuts off the Minority
382 rights in a most intemperate and inappropriate way, because it makes it impossible for the
383 Minority to come forward with amendments.

384 When I arrived here, the whole purpose of the Senate was to bring Bills to the floor.

385 And anybody who wanted to come to the floor and amend the Bill in any way they wanted to
386 pretty much got to do that. I can remember when we brought appropriations Bills out of the
387 Appropriations Committee, I had the good fortune to chair two different Appropriations
388 Committees that Bills went across the floor every year, I would plan when I had the Commerce,
389 State, Justice Committee, to get amendments on everything, everything under the sun.

390 There would be gun amendments. There would be marriage amendments. There
391 would be Mexico City amendments. You name it, it was going to come on the Bill. I
392 expected that as the Leader on the floor responsible for this piece of legislation. And it was
393 good. It was a good discussion. And we always reached a conclusion, took a little longer
394 usually depending on who was around. But it took a little longer to get to a conclusion, but
395 we always did it.

396 When you fill the tree, you cut off the Minority's ability to make those types of
397 amendments and it really is detrimental to the institution itself because if you do not allow the
398 Minority to amend, in fact if you do not allow every member of the Senate to have an
399 opportunity to amend, then you are basically undermining the whole purpose of the Senate.

400 Now regrettably, filling the tree has become an unfortunate practice here. In fact, in
401 this Senate the tree has been filled more than it has been filled under the last six Majority
402 Leaders. That is not healthy.

403 And the Chairman talked a little bit about filibustering the motion to proceed. Why is
404 the motion to proceed a critical motion? And why should filibuster still be applicable to the

405 motion to proceed? It is because at that point that the Minority Leader has leverage to
406 negotiate, to the extent that negotiation occurs, how the Bill will be managed when it hits the
407 floor, and what the amendment process will be. If you shut off that point of pressure, then
408 you once again close down the capacity of the Minority to make its case and get the Bill to the
409 floor in the form where amendments can be allowed.

410 So I believe very strongly, as the Chairman has outlined in his opening statement
411 relative to filling the tree, and as Senator Dodd has outlined relative to the filibuster, that at the
412 essence of the Senate is the ability of the Minority to amend. That is simply what it is all
413 about. And if you foreshorten the ability of the Minority to amend, you undermine the
414 purposes of the Senate and you undermine the constitutional form of government we have.

415 And I thank the Chairman for his time.

416 [The prepared statement of Senator Gregg included in the record]

417 Chairman Schumer. I thank Senator Gregg for his excellent statement. And maybe
418 since it was brief, does anyone have a question they would want to ask Senator Gregg?

419 Well, I have one. We do have--from your statement maybe you do not believe the
420 Senate in the last couple of years has sort of become more dysfunctional. And neither side
421 gets what they want. The Majority does not get to move forward on legislation. The
422 Minority does not get to offer amendments, either germane or not.

423 And does the Senator think there might be some grounds for compromise, where say,
424 for instance--and I understand his point on the motion to proceed--where you would not be

425 allowed to filibuster the motion to proceed but at the same time, and someone proposed this
426 at our last hearing, there might be a guaranteed right for the Minority to offer at least a
427 number of amendments not to be dilatory but have that opportunity as sort of a tradeoff.

428 Some of our witnesses last week said that they thought the Senate had departed from
429 its function of being the great society where the great debate occurred, the issues were
430 debated, etcetera, given the gridlock we have here, without pointing fingers of blame.

431 Tell me what you think of that kind of tradeoff.

432 Senator Gregg. I think it is dangerous. I think because you can never anticipate what
433 the Minority needs. I cannot anticipate that. The Republicans may be in the Majority in the
434 next Senate or the following Senate; you do not know what the Minority position is going to be
435 on a piece of legislation because you cannot anticipate the legislation.

436 So the Minority has to be able to retain as many rights as possible to the floor, and to
437 the ability to amend on the floor.

438 I agree that there is a problem in the Senate right now. But I think it is the fact that we
439 do not take Bills up on regular order. The fact that we basically have a reticence within the
440 Senate to make the tough votes on the floor. I mean, we have done some fairly complex
441 legislation around here. We have a lot of floor activity.

442 The Financial Reform Bill, for example, was a very complex piece of legislation which
443 was on the floor for a long time, and which was debated and amended. The managers kept
444 the amendments on target, and strong managers can do that.

445 We did it with the Immigration Bill. That Bill was on the floor for a long time.

446 Aggressively amended.

447 And the Healthcare Bill started off that way. Of course it got foreshortened at the end,
448 which was really I thought unfortunate.

449 But it is just a question of getting a calendar where the Majority understands that if it is
450 going to take big pieces of complex public policy to the floor, it is going to have to spend two or
451 three weeks to do it. And I do believe that that is very doable. And I think we have shown
452 we can do it as a Senate.

453 And I think the body functions well if it is given the opportunity to amend. People run
454 out of energy, we all know that. These amendments stop coming after a while. And people
455 have to make tough votes. That is what it comes down to. People willing to make the tough
456 votes.

457 Chairman Schumer. My proposal was not curtailing the right to require tough votes.
458 It would be dealing with something like unlimited amendments, or the ability of -- now
459 obviously one person cannot do this, one person can slow it down but cannot stop it -- but the
460 ability to even prevent an issue from coming to the floor, unless you have 60 votes.

461 And forestalling the kinds of debates that you talked about was not used for
462 Immigration, was not used for, as you say it was for healthcare later, but the other issue you
463 mentioned, I cannot recall it.

464 Senator Gregg. You know, theoretically, I think you probably can make an argument

465 for that decision. But I cannot predict, nor can anybody in this room predict the practical
466 needs of the Minority as it goes forward. And I think you have to reserve as much authority to
467 the Minority to be able to influence its ability to make its case on the floors as possible.
468 Presently that means being able to filibuster the motion to proceed until you get to a point
469 where the Minority feels its rights to amend are protected.

470 Chairman Schumer. All right. Anyone else? Senator Alexander.

471 Senator Alexander. Senator Gregg, Senator Byrd indicated in his testimony earlier this
472 year that he thought that while there were abuses of the current rules, that the Senate could
473 work under the current rules if the Leaders would just use them. And he used examples of, in
474 terms of the filibuster, just confronting those who wished to filibuster and keep the Senate in
475 session, just one day after another, and other such steps.

476 And I am wondering whether you, as you look back over at your years here, think that
477 we could get to a situation where a Minority could insist of the Majority, whichever party, that
478 there had to be amendments and debate, and where the Majority could by holding the Senate
479 in session, keep filibusters under control?

480 In other words, can this be done without changing the rules?

481 Senator Gregg. Well, my experience is that the 24 hour attempts to try to break a
482 filibuster do not work, because basically it is the Majority that has to produce the people. And
483 that is really, the Majority's never going to be able to break a Minority by keeping you here all
484 the time, because the Minority really does not have to be here. All they have to do is keep

485 somebody on the floor to object.

486 So I just do not, I have never seen that as the best way to address how you--visually and
487 politically it might have an effect. The population may say, well, they are there all night, look
488 at that, this is an important issue. But I do not think it subsequently affects the capacity to
489 deal with a filibuster.

490 I suppose you could change the rules so that if you go into a filibuster status, those
491 seeking the filibuster would have to attend in order to pursue the filibuster. That is a
492 possibility. And maybe a Minority that wants to filibuster should have that responsibility.

493 Chairman Schumer. Senator Durbin.

494 Senator Durbin. I would like to follow up on that, because we had a classic example
495 where a member from your side forced a vote on a Saturday on a filibuster. And then when
496 60 or 70 of us changed our schedules to not go home to our families, the Senator who forced
497 the vote did not show up for it. Was at a wedding in his home state.

498 It strikes me that this really is offensive, that someone says, I have got to protect my
499 rights, but in absentia, I have got things to do back home, so why do not you all stay on the
500 floor here and come up with 60 votes.

501 Senator Gregg. I think that is a legitimate point, Senator.

502 Senator Durbin. Well, I also want to ask this question. Do you not believe though--I
503 like Jimmy Stewart, do not get me wrong--but he has created an impression of the Senate
504 which I do not think reflects the reality of the Senate.

505 Senator Gregg. I have always thought of you as a Jimmy Stewart liking figure.

506 Senator Durbin. Yes, that is me. And, Spirit of Saint Louis.

507 But the point I want to get to is, do not you believe that there should come an obligation
508 with those who initiate the filibuster to at least be present? Or those who support their
509 position to be present on the floor, if we are going to "burn 30 hours"? What a terrific waste
510 of time.

511 At the heart of this is something that goes unspoken in most of these hearings, why do
512 we want to avoid controversial amendments? Because we want to avoid controversial ads
513 running against us in the next campaign. Once you have been around for a few years and you
514 have cast thousands of votes, you figure there is plenty for them to work with and I do not have
515 to worry about tomorrow's vote.

516 And secondly, the reason why we cannot burn off the hours, for example the Food
517 Safety Bill, which you and I had worked on for over a year, and want to bring to the floor, the
518 one Senator who is holding it up says, well if you want to bring it, we'll just go ahead and file
519 cloture. Knowing full well we do not have the time for it, because members cannot stay in
520 town as much, because they are out raising money for their campaigns.

521 So I mean, does not this reflect the new reality that maybe Senator Byrd did not have to
522 live within his political experience, that now is the reality of the Senate?

523 Senator Gregg. Well, I think that was the point that Senator Alexander was also
524 raising, which I think is legitimate to look at. Whether if you are asserting the filibuster right

525 you should have to be available to defend that right on the floor.

526 I would simply point out the Food Safety, like you I would like to see it passed, but to get
527 it passed it should have been on the calendar earlier. You know as well as I do that if you push
528 up against an adjournment event, the power of a single Senator grows exponentially as we
529 head towards adjournment around here.

530 But yes, I think it is worth considering whether or not those asserting their rights under
531 the filibuster should have to be present to defend that right, and presently they do not have
532 that.

533 Chairman Schumer. And we had a hearing on that, Senator Lautenberg actually
534 proposed that as a rule change.

535 Senator Roberts for a question.

536 Senator Roberts. Well first of all, I want to say to Jimmy Stewart that I like your role in
537 the Glenn Miller Story. I thought you played an excellent role.

538 Chairman Schumer. I thought he played an excellent clarinet.

539 Senator Roberts. I think it was a trombone.

540 Senator Gregg. It was a clarinet.

541 Senator Roberts. Was it Glenn Miller?

542 Senator Gregg. Oh was that Benny Goodman, I am sorry.

543 Senator Roberts. That is right.

544 Senator Alexander. Here is another example of gridlock in the United States.

545 Senator Roberts. I offer an amendment to clarify the record.

546 Senator Gregg. Please, I withdraw my comment.

547 Senator Roberts. All right. Bob Byrd came here in one of his last appearances before
548 Committee, it was a very poignant time. And said that a Minority can be right, and Minority
549 views can certainly improve legislation. The bottom line of my statement which I will insert
550 for the record and save time when we get to that, is that Mr. Chairman the way forward is not
551 through rules changes, it is understanding the purpose of our rules to foster consensus,
552 bipartisanship, and moderation.

553 Let us try to return to our Senate tradition before embarking on a radical rule change
554 that sounds almost like kindergarten stuff, really, given the challenges that we face, or a hope
555 that cannot come true.

556 But let me ask Judd, as you have been here as long as I have, and we came to the House
557 together. What do you see down the road? Because partly what impacts this is not so
558 much--well, it does impact it in terms of filling the tree and finding cloture and all of these
559 things. But rightly or wrongly, the Congress reflects the Balkanization of the American public.
560 And it seems to me that we are terribly Balkanized, and it seems to me that if we reinforce that
561 with the information that we receive, everybody gets their netherworld of information now
562 from the Internet and the Web and Facebook and tweets, and all the things that I do not
563 understand. And that my staff does not let me see.

564 But at any rate, it is a far different world. Somebody said something about going to
565 Conference, and it helps matters at the last Conference that I attended was the 2008 Farm Bill,
566 we had 41 members. Half of them had never seen a farm. They could spell farm, but not
567 agriculture. I think Charlie Rangel was the head of the Conference, and announced that he did
568 not know why he was there, but that the Speaker had asked him to be there, so he was there,
569 and then left.

570 Usually during a Farm Bill Conference we had 15 or 16 people including the Senator
571 from Illinois--who was for corn, I was for wheat, by the way, but that is how that would work.
572 But we worked it out. And I am just wondering if there are not elements that are at play here
573 with our society that makes this much more difficult. The Senator from Illinois said everybody
574 has gone to raise money, actually you are here to raise money.

575 Well, some people go to places where there are water holes where I guess you can drink
576 more freely from in terms of money for campaigns. But there is a Tuesday-Thursday mentality
577 here as opposed to earlier times when people socialized together. People knew one another.
578 People at least spent some degree of time in the other person's shoes. And I think it is that,
579 that we have lost. Or that we have really seen dwindle away.

580 Where are we going to be five years from now if this keeps up in terms of the
581 Balkanization we see in all of this talk about, we have lost comity and everything else? Part of
582 that I do not think is right, because you and I have served here during the Vietnam days, during
583 the impeachment, during Nixon resignation, during you can name any number of issues here

584 that were great great challenges that produced an awful lot of rhetoric and a lot of challenges.

585 But at any rate, where are we headed here? Where are we going to be in five years, Judd?

586 Senator Gregg. Well, my biggest concern would be that we end up like the House of
587 Representatives. That we end up basically as an institution which this not have the openness
588 that traditionally and historically this institution requires, relative to debate and amendment
589 and discussion.

590 As to collegiality, there is much more pressure on every Senator now to be off
591 somewhere, to be doing something. I think Dick Lugar described it most effectively when he
592 said the Senate is a one hundred carrier task force going down the hallway. It is an
593 unfortunate fact. But that is the nature of our times. Times change, and we obviously are
594 representing an extremely sophisticated society that requires a great deal of its government.
595 And especially those who represent it.

596 So I do not think you are going to put the genie back in the bottle and suddenly have
597 what used to happen in the 50s and 60s where people hung out in the afternoon and had drinks
598 and spent the weekends with each other. But you can keep the place collegial just by keeping
599 it open, so that people do not feel that their rights are being shut off, and so that people do feel
600 that they are a single individual who can make a difference within the Senate, which is what the
601 Senate is all about.

602 Chairman Schumer. Well, on that note we thank you, Senator.

603 Senator Gregg. Thank you.

Chairman Schumer. Thank you for your thoughtfulness and participation here today.

Let me now call on our next panel of witnesses. There are two. A warm welcome to them. They both are regulars here, and we thank them for that.

First is Marty Paone. And by the way, I was just informed that you like it Paone not Paone, so I apologize for all the years of calling you Paone. In any case, it is good to see you back. And we know you hold the Senate in great esteem, as does your colleague Senator Ornstein.

Marty Paone is a veteran of the United States Senate, he began working on the Senate floor for the Democratic Leadership in 1979. From 1995 to 2008 he served as an officer of the Senate in the position of Democratic Secretary, and he is currently Executive Vice President of the Prime Policy Group.

Mr. Norman J. Ornstein is a resident scholar at AEI, the American Enterprise Institute, where he also serves as the co-director of the Election Reform Project. He is author of many books about Congress, including the Broken Branch. He writes a weekly column for Roll Call, is an election analyst for CBS News and a Senior Counsel to the Continuity of Government Commission.

Gentlemen, both your statements will be read into the record in their entirety, and you may proceed as you wish. We will begin with Mr. Paone.

STATEMENT OF MARTY PAONE, EXECUTIVE VICE PRESIDENT, PRIME POLICY GROUP,

WASHINGTON, DC

Mr. Paone. Thank you Mr. Chairman and members of the Committee. I am honored

to be here discussing the procedures of the Senate, a subject that I learned to cherish while working for Leaders Byrd, Mitchell, Daschle and Reid.

I served on the Senate floor for almost 29 years. During that time, I was Secretary for the Majority twice and Secretary for the Minority twice. I had two sets of cards, depending on the election.

Following the election, if there was a change in the Majority I would joke with my Republican counterpart that in addition to handing over the presiding work, we would also trade speech folders. One accused the other of being an obstructionist, while the second complained of the trampling of the Minority's rights.

Today it is my understanding you will be focusing on four aspects of filibuster reform. Motion to proceed. Eliminating a debate on a motion to proceed would save time and put the legislative calendar on an equal footing with the executive calendar. A middle ground would be to institute a time limit on the motion to proceed. Any modification of this motion would streamline the operation of the Senate but for just that reason could be expected to be met with Minority opposition.

Post-cloture term. During the 30 hours post-cloture, each Senator is entitled to speak for up to one hour. One member could still cause considerable delay, because quorum calls, while counting against the 30 hours, do not count against the member's hour.

645 While you can force the opponent to remain on the floor or else the Chair will put the
646 question, and I think you all skipped over that earlier, you cannot force them to debate and
647 consume their hour. One possible change would be to charge the quorum time towards the
648 Senator's hour.

649 An alternative idea would be to count any time consumed in a quorum call at an
650 accelerated rate. Say a multiple of ten. So that every minute spent in a quorum call would
651 count as ten minutes. If this were the rule, then during post-cloture time I would eliminate
652 also the ability to object to the dispensing of a quorum so that the Majority could not abuse this
653 accelerated clock.

654 Over the years a process has evolved so that once cloture is invoked the amendment
655 tree remains filled and even germane amendments are blocked out. One suggestion would be
656 to automatically tear down the tree post-cloture, and to provide for a guaranteed number of
657 amendments from each side. The amendments would start to qualify under Rule 22, be
658 timely filed, properly drafted, and germane.

659 Other possible changes include a reduction in time on nominations, since they are
660 unamendable. Adding a three-fifths vote to reduce the time. Or reducing the threshold to
661 invoke cloture to a three-fifths vote of those voting and present.

662 There have been complaints about the waste of time spent on nominations that are
663 eventually confirmed by nearly unanimous votes. One change for nominations with lifetime
664 appointments would be a reverse cloture motion. It would work like this. The Majority

665 Leader would ask consent to confirm a nomination or to get a time limit on it.

666 If there is an objection, then the next day by 4pm the opponents would have to file a

667 motion of opposition which would state that they intend to vote against the nomination.

668 Sixteen signatures, the same as for cloture would be required on that motion. And if it is not

669 filed by the appointed time, the Senate would then proceed to the nomination, and it would be

670 considered a time limit of two hours equally divided. If the 16 signatures in opposition are

671 secured, then the Majority Leader could file cloture motion on the nomination, which would

672 ripen the next day.

673 Substitute amendments. It is virtually impossible for a Committee substitute or a floor

674 substitute to meet the strict germaneness test of cloture. This necessitates the filing of

675 cloture motions on the substitute and on the Bill itself. The latter is a true waste of time, since

676 once the substitute amendment has been adopted, the Bill is no longer amendable. The

677 substitute amendment should be automatically considered germane.

678 The appointment of conferees. It takes three separate debatable motions to send a

679 Bill to Conference. Many times in the past, these were adopted by consent. But over the

680 years, both parties have objected to the appointment of conferees, and not it is the exception

681 rather than the rule to see a Bill sent to Conference.

682 Combining the three motions into one would still allow the opposition to filibuster this

683 stage of the process. This might also reduce the use of the message between Houses method,

684 or what has come to be known as the ping-pong process. If this process is to be used more

sparingly, then not only should the motions be combined, but there should also be a prompt cloture vote and a reduction in post-cloture time. If the Minority truly wants to participate in Conferences, then they should allow the appointment of conferees.

Filling in of the tree. Everyone agrees that the Majority Leader has priority recognition. It follows then that the Majority is entitled to the first vote on a given issue. Majority Leaders from both parties have filled the amendment tree to get a first vote on an issue. And sometimes on more than one issue. However at some point in order to move the process along, the Majority Leader has to pare back the tree and allow other amendments. If amendments are not allowed, then the Minority's natural response is to vote against cloture as a protest for being shut out of the amendment process.

Majority Leaders from both parties have been asked by their members to protect them from certain votes. In my opinion that is an unfair request, and it puts the Leader in an untenable position of having to fill the amendment tree and possibly fail to enact the legislation in question.

The solution to this is simple. Do not ask the Majority Leader for such protection. Senators should be prepared to vote at least on a cloture vote or a budget waiver vote with respect to any and all amendments and move on.

Again, I thank the Committee for this opportunity this morning, and I welcome any questions.

[The prepared statement of Mr. Paone in the record]

705 Chairman Schumer. Thank you Mr. Paone.

706 Mr. Ornstein.

707
708 **STATEMENT OF NORMAN ORNSTEIN, RESIDENT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE**
709 **FOR PUBLIC POLICY RESEARCH, WASHINGTON, DC**
710

711 Mr. Ornstein. Thanks Mr. Chairman. It is always an honor and a privilege to be in
712 front of this Committee.

713 I want to start by saying to Senator Bennett, I was at Brigham Young University two
714 weeks ago for Constitution Day, and spent a sizeable amount of time there and in Provo. And
715 I can testify to the enormous amount of goodwill and warmth that still exists in the state for
716 you, and regret that the voters did not have a chance to express that again in November.

717 This is my favorite Committee in the Senate. I have testified in front of it many times
718 over the years. And it is my favorite Committee because the members who are on this
719 Committee understand and appreciate the role of the institution. It includes some of my
720 favorite Senators on both sides of the aisle. And I am delighted that we are getting some
721 junior members like Tom Udall who are so deeply committed to the institution and throw
722 themselves into that role.

723 I want to comment for a minute or two on some of the discussion you had with Senator
724 Gregg. I do think the problem is more of the culture than it is the rules, that the rules
725 operated better in a previous era. But frankly the reality is the culture is going to get worse
726 before it gets better. Because I see the newcomers who are going to be arriving in this
727 institution in January, and there are many of them who do not fit the mold of the people who
728 are serving on this Committee. If we had only people on this Committee cloned to make a
729 hundred, I do not think we would have as much of a problem, we would not have to spend so
730 much time here.

731 But we are going to get a number of people coming in who are like the one Senator now
732 who has decided that he is the word and the truth and is going to hold up everything, who do
733 not see the value of compromise, of respecting and looking towards the views of others. And
734 that means that while we cannot solve the problems of the culture, I do believe that it requires
735 some significant focus on the rules to remove some of the unnecessary and extraneous
736 obstacles that arise that affect both sides of the aisle, but also that use up the most precious
737 commodity the Senate has, which is time, often just for the purpose of using up that time.

738 One other comment relating to something that Senator Durbin said. If I could wave
739 my magic wand and do one thing, it would not be some of the things we are talking about here.
740 It would be to move the Senate to a schedule which was five days a week, three weeks on and
741 one week off, with no fund-raising during those 15 days a month. You can have 15 days a
742 month to fundraise, I think that would be adequate even under the current system.

743 But if you were here nine to five, Monday through Friday, it not only would provide a
744 better family life, and more opportunities to interact socially, but it might create a very
745 different kind of atmosphere in way of operation. But that may be harder than changing any
746 of the rules that we are talking about.

747 On the rules themselves, I want to associate myself with what Marty said, with most of
748 his changes. And I start with the belief that we need to look at the idea of a one bite at the
749 apple principle. That there is, despite what Senator Gregg said, there are ample opportunities
750 before you ever get to the motion to proceed for the Minority Leader to negotiate with the
751 Majority Leader.

752 I do not see that the leverage of another filibuster, which is still going to require 60
753 votes when you get to the Bill itself, is a necessary commodity. And that having two, three, or
754 more bites at the apple only serves to provide opportunities for delay and obstruction. I do
755 not believe, and I agree with Senator Dodd, that we ought to make the Senate like the House.
756 I do not believe that we should move the threshold down, although I do think that moving to
757 three-fifths of those present and voting would deal with one of the issues and problems that
758 Senator Gregg mentioned, which is changing the incentive, so that it is the Minority that has to
759 be on the floor if you do have extended debate.

760 And I have also, as perhaps you have seen, and part of this flowing from conversations
761 that I had with Senator Udall and his staff, think it is worth considering and maybe even just for
762 nominations, not just the 16 votes required to file a petition, but make it two-fifths of the

763 Senate required to extend debate rather than three-fifths of the Senate required to end debate.

764 Shift the focus to the Minority if they feel intensely enough about an issue with great national

765 import, then they ought to be the ones who have to provide the votes.

766 The idea that Senator Byrd, the late, great Senator Byrd, when he was extraordinarily ill,

767 had to be forced to come to the floor to provide a 60th vote, or that the Senate was frozen in

768 the period after his death and before Senator Goodwin came in, just does not make a whole lot

769 of sense to me as a way to operate.

770 With all of that, I do also believe, and I have a number of suggestions which are a little

771 bit different perhaps in form from Marty's, most of which are now incorporated or will be soon

772 in a resolution that Senator Mark Udall is introducing, which I would endorse as well, but

773 believe that we need to focus on the filling of the amendment tree as well.

774 And I do think that, you know, it is a chicken-and-egg problem. But we need to deal

775 with both the chicken and the egg at this point. And finding a way to guarantee the Minority

776 an opportunity to have its voice and to offer an amendment is a necessary component to any of

777 the other changes in the rules that we implement.

778 And I hope with some of these, which I think are common sense things, do not detract

779 from the Minority's ability. When it feels intensely about an issue of great national moment,

780 to extend debate or to raise the bar, are things that ought to be able to get enough votes, that

781 perhaps we would not even have to turn to the constitutional option.

782 Thank you very much.

783 [The prepared statement of Mr. Ornstein in the record]

784 Chairman Schumer. Well, thank you. And thank you both. Excellent testimony.

785 I have specific questions on specific proposals. But I think, I would like to ask two
786 questions of each of you in a broader sense.

787 As you can see here, you heard Senator Dodd's testimony, we all remember Senator
788 Byrd's. Here is the broad philosophical division, I guess, or disagreement among Senators.
789 And some say, the world is moving much more quickly. We are in a globally competitive
790 world. We cannot just have delay, as our country has urgent needs, over and over and over
791 again. This would reflect not only on delay, but 60 votes, because the Minority seems to wield
792 those together now.

793 The other argument is, this has worked for 220 years, and urgencies have appeared at
794 various times in the past. And you do not mess with something that has worked, for all the
795 momentary -- I guess the others, those who would argue this, would say -- frustrations. Do we
796 need, does the new world demand, some kind of fundamental change, not to block the
797 Minority from offering amendments, but to allow the Senate to move more quickly? Because
798 it has come to a standstill, and as one of you mentioned, next year could come to a greater
799 standstill.

800 And a Minority Leader could take on seven or ten resolute Senators who say, "we are
801 going to stop every nickel of spending". But a Minority Leader generally will not do that,
802 because a Minority Leader will have a constituency of 43, and if there are seven adamant

803 people, he just does not want to alienate them.

804 Okay, that is the first question, the sort of large question. And then the second
805 question relates to what Professor Norm Ornstein said. The ideal way to do this, if we were
806 going to make some changes, would not be invoking the Constitution, but to get two-thirds of
807 the Senators to agree that some changes are needed, which by definition says you have to deal
808 with both the Minority's concern, which is--and I believe the Majority and Minority will stay the
809 way they are but they could change for all we know in the election--you have to deal with the
810 Minority's ability to offer amendments so that they do not slow down the process as a way to
811 get amendments. Slow it down to a point of absurdity.

812 So I would like both of you to comment, and that is my only question, on both those
813 questions. The large picture question, do we need change? Does the new world demand
814 change? Or should we just stick with what has worked with the most successful nation in the
815 world in the past? And then second, what are the chances, if we do need change, of getting it
816 to be done in a two-thirds Majority way?

817 Mr. Ornstein. I will start Senator. First, on the first question. We have operated for
818 220 years. We have also changed the Senate's procedures numerous times over those 220
819 years when conditions demanded it. We changed the rule in 1917. Of course, we eliminated
820 the motion to proceed very early on, which helped to create some of the issue that we have
821 with regard to filibusters today.

822 We changed things again in 1975. We have to be very careful about the changes. I

823 think one of those changes inadvertently helped to exacerbate the problems, which is when we
824 moved to an absolute number of three-fifths of the Senate. If you have present and voting,
825 then Minority does have a reason to stick around to meet quorum calls, so you could actually
826 do something with extended debate.

827 But I think conditions warrant change. We have passed a lot of legislation, it is true.
828 It is not the best way to legislate when you can have one, two, or three Senators who are
829 needed to make up the 60 votes who exercise an enormous amount of leverage and do not
830 necessarily make for better legislation. I would rather have a more open amendment process
831 to make it work that way.

832 But what also happens is, when you take out, stretch out the time, and let us face it,
833 when you have filibusters on nominations that pass unanimously, when you have filibusters on
834 Bills that ultimately pass unanimously or near unanimously, this is not a Minority that is trying
835 to express an intense point of view. When that happens, then the queue gets longer, and
836 important Bills, like the Food Safety Bill or others, get delayed.

837 Now, that may--perhaps it could have come out earlier--but the fact is we have got a lot
838 of legislation that takes a long time to incubate and work through the issues and to get
839 compromise. If you have used up all the time, there is no time left. And so I would really
840 think that some of these changes--I should know, I mentioned a couple of others like the idea
841 that you have to read amendments word for word if they have been posted online for 24 hours,
842 I think there are ways of clearing the decks a little bit there.

843 But I just think that change is necessary. And ideally, change happens with a bipartisan
844 consensus. And I would hope--I mean, there are no Senators I respect more than Senator
845 Roberts, Senator Alexander, Senator Bennett--that both sides could work together to find some
846 common ground here, and try to avoid having either a confrontation over the rules or an
847 inability to--

848 Chairman Schumer. What do you think the likelihood of that happening is?

849 Mr. Ornstein. I suppose I could invoke George W. Bush, slim to none, and slim just left
850 the building. But I actually think--I have been impressed with these hearings. These
851 hearings have not been confrontational. There are different points of view obviously
852 expressed by Majority and Minority, and by those who have been in the Minority before and
853 understand they may be again. But I think this has been a search for common ground rather
854 than just position taking.

855 So I hope from some of the ideas that we and others have discussed, you could find
856 some areas where you could strike the right balance, preserve Minority rights but also enable
857 some more efficiency. Because we are going to move from productivity to something that
858 much more resembles gridlock given the changes that are going to take place in our politics.

859 Certainly in November and heading to January. And it is a dangerous, dangerous time
860 for the country with the issues that we face. And I think we have got to grapple with making
861 sure that there is an ability to act in a reasonable and balanced fashion.

862 Chairman Schumer. Mr. Paone.

863 Mr. Paone. Yes, I think it would be good to have some change. But in the era--you
864 do have a new era, obviously of instant news, the Internet, etcetera, the Senate has changed
865 also. Let's face it, it is a light lift here, these days, working only from Tuesday to Thursday
866 afternoon. I mean, working a five day week would be a change, but you showed from
867 Thanksgiving to Christmas Eve that it can be done. You can use the clock, and if you use the
868 clock, especially at the beginning of a Congress, more efficiently, then you do not need a rules
869 change for that.

870 If someone says they object to a motion to proceed, say fine, then you are going to be
871 on that floor not just when we invoke cloture, you are going to be on that floor now, Monday,
872 until we have that cloture vote on Wednesday. I do not have to bring in all my members, I am
873 just going to bring in a Presider and a Leader, 24-7. And if you go to the bathroom, I am
874 putting the question.

875 Now, granted, at the outset, that person will get some help, because everyone will want
876 to help him in a three-to-five am range, sure, I will come running over to help you. You do
877 that three or four times though and it is going to get of old, and I do not think it is going to be as
878 easy to find help in that early morning range. Also it will highlight, and it will answer your
879 critics who ask: "why do not they make them filibuster?"

880 Well Jimmy Stewart's "Mr. Smith Goes to Washington" was a movie, and this will show
881 them what they get with a filibuster. You get a quorum call, the senator sitting there reading
882 his mail. But you can at least make his life miserable. You do not have to have a roll call vote

883 and bring everybody else in to make their lives miserable. In any case , that is something you
884 can do without a rules change.

885 And it is not inconceivable that you can change the rules. Yes, you will need bipartisan
886 ship to change the rules. I mean, in 1986 when you went on tv there were a number of
887 rules changes that were instituted in that resolution. In 2007, the Ethics Bill, a number of
888 rules changes were included in that Bill. It is not inconceivable that you could have a moment
889 in history where there is such a momentum for a piece of legislation that you can come to a
890 bipartisan agreement that yes, in this we are going to include a couple of modifications on how
891 we operate. But obviously it is going to have to be done in a bipartisan way.

892 As I said, using the clock in a more efficient way not just on a filibuster but working
893 Monday through Friday, working more hours, keeping people in town, all of this would go a
894 long way towards improving your efficiency. In the old days, the people used to say
895 air-conditioning is what killed this place. Air-conditioning and the airlines, because it allowed
896 members to go home on weekends. And then eventually no longer brought their families
897 with them to Washington.

898 In the old days, you would have a new member come in, he would be in the cloak room
899 asking Muskie and Jackson, where do I get a realtor? What school should I send my children
900 to? Do I live in Potomac or do I live in McLean? And they would end up commuting
901 together. Stevens would commute in with Muskie. One day he had a horrible day because
902 he told Muskie not to pass a bill before he could do his amendment, and Muskie went to third

903 reading and ignored Steven' demand to offer an amendment. Mansfield then had to come over
904 and undo a vote so that Stevens could offer his amendment.

905 But you guys used to commute. You used to live in the same neighborhoods. And as
906 a result, you went to the PTA meetings together. You got to know each other as people. Not
907 as enemies, not as opponents. And so, if you make people stay here five days a week, no
908 matter where they live, what part of the country they have to go to, for an extended period, I
909 think that would contribute to some of that.

910 Chairman Schumer. And again, question I asked, Mr. Ornstein. There is a
911 constitutional option obviously that Senator Udall has explored.

912 Mr. Paone. Yes.

913 Chairman Schumer. So you may not need the two-thirds. But obviously I think
914 everyone would agree, that would be preferable if rules changes were to be made. What are
915 the chances that we could get that two-thirds on some kind of balanced package in these times
916 right now?

917 Mr. Paone. Right now I do not think you would get the two-thirds. Especially as you
918 are heading into an election which may result in many new members. You are even at 15 new
919 people, even if everybody gets reelected.

920 Chairman Schumer. Right.

921 Mr. Paone. So you are going to have new people, and these new folks will not have a
922 legislative institutional knowledge of how this place operates. And I do not think you would

923 get two-thirds. But by the same token, I don't think it is out of the question that down the
924 road, you might be able to get a Bill passed that incorporates some rules changes.

925 The constitutional option would bring, in my opinion, irreparable harm to this body if
926 you were to utilize it.

927 Chairman Schumer. Thank you. Senator Bennett.

928 Senator Bennett. Thank you very much Mr. Chairman. I have enjoyed this morning.
929 I have enjoyed the historic review. Marty, I remember the days when Senators spent time
930 with each other. And I was here as a staffer when Everett Dirksen determined the wording
931 and direction of the Civil Rights Bill.

932 Everybody talks about Lyndon Johnson's legislative genius creating the Civil Rights Act of
933 1964. It was Everett Dirksen that made that possible.

934 And I remember when Bobby Kennedy was the Attorney General, and the writing of that
935 Act. Kennedy's staff would come to the Hill, and they would not go to Mike Mansfield's office.
936 They would go to Everett Dirksen's office. Because the Southern Democrats were threatening
937 the filibuster. Dirksen with his Republicans held the balance of power to break the filibuster.
938 And the Administration had to make sure that Dirksen felt okay about it.

939 And you may remember that Barry Goldwater, the Republican standard bearer in that
940 election voted against the Civil Rights Act, which created a problem for my father because my
941 father voted for it, and thus guaranteed himself a primary opponent the next time he came up.

942 So I am familiar with all of the give and take and the historical circumstance you

943 described. Let me add just a little historical perspective from my own experience.

944 I think the Majority Leader has the authority to crack the whip now if he wants to, and
945 clean up a lot of the things that you are talking about. And Marty, your comments I think sort
946 of fit in to this. Let me give you one historic example.

947 Back in 2006, John F. Kerry was in Europe, and Sam Alito was up for nomination to the
948 Supreme Court. And basically Kerry phoned in the filibuster. He made a phone call to Harry
949 Reid, and said, no, I will not allow a vote, and so on. And Harry responded to that. And
950 Kerry was out of the country.

951 By contrast, I remember managing a Bill on the floor, and a Senator who will remain
952 nameless because none of this got into the press as the Kerry thing did, said, I will object if
953 Senator X offers this amendment, and my objection will go to such lengths that we will have a
954 filibuster.

955 I said okay, I am going to notify Senator X of that fact, and he is going to come to the
956 floor and offer the amendment. And you are going to have to be here on the floor or I will
957 accept it, as the manager of the Bill.

958 And Senator X showed up, offered his amendment. The Senator who said, I am
959 opposed to this, I want to put a hold on this, was not on the floor. And as the manager of the
960 Bill, I said I have no objection to this, and there was no objection.

961 The Senator's staff was livid. But I said, if the Senator really, really wants to object to
962 this, the Senator has to be on the floor. Now, I sound braver than I was. Because I cleared it

963 with the Majority Leader, who said sure, go ahead.

964 So here are two examples of a Majority Leader saying, the Senator has to show up or his
965 hold will not matter, or the Majority Leader saying to a Senator who called him from Europe,
966 okay I will honor that, you do not have to show up, you can continue your trip abroad and a de
967 facto filibuster will be on it.

968 I would like you both to comment on that. And the pressures, maybe Marty you have
969 a better insight into this than any of us, the pressure is on the Majority Leader when something
970 of this comes up, because if a Majority Leader says, and I have had Majority Leaders tell me,
971 Trent Lott you know, if he does not show up, never mind.

972 Now it was somebody with whom Trent had a particular problem. But would that kind
973 of action on the part of the Majority Leader produce the kind of efficiency that we are talking
974 about without any changing in the rules? And what are the pressures on the Majority Leader
975 to say, oh no, you do not dare do that.

976 Give me some reaction to that.

977 Mr. Paone. Well obviously everything is on a case-by-case basis. We had one
978 situation where Mitchell was trying to get an agreement on a Bill and a senator called in who
979 was watching on CSPAN, and they called in from their living room and said they wanted to
980 object. And I told Senator Mitchell about that Senator and where he was and he said, tell him
981 he needs to come to the floor if he wants to object.

982 And that is why when we as the floor staff would help with new staff when they would

983 come over at the beginning of a Congress, we would explain to them that letters you write, do
984 not consider them hold letters. We call them consults. Because your hold letter is only as
985 good as your ability to get a Senator to the floor to object, and to debate the motion to
986 proceed. We would warn people that just because you say you have an objection does not
987 mean that the item is not going to come up. You have to be able to produce the senator to
988 filibuster.

989 And like I say, it is on a case by case basis. That one instance, on Alito, yes, there was a
990 situation where a member was out of the country and he wanted to be involved with the vote
991 or the debate, but quite frankly, he was not the only one, if my recollection is correct, that was
992 opposed to Alito. So that is not what completely stopped that in its tracks.

993 Yes, the Majority Leader does have that ability to ignore a "hold" request. But at some
994 point he is also the Leader of his party, and he is responsible for looking out for the interest of
995 his members. And he will tell them yes I will look out for your interests, but you have to at
996 some point come over and do it yourself. You cannot expect me to be the one debating that
997 issue. You are the one who has the opposition. I will buy you some time, I will honor your
998 objection for a period of time, but eventually you are going to have to be the one to come here
999 and oppose this issue.

1000 Mr. Ornstein. Senator I do think that one real problem with the Senate now is that
1001 there is way too much deference to individuals even though it is a body made up of individuals.
1002 My favorite story about the Senate is when Senator Mitchell left this body at a very young age,

1003 and he went out and interviewed to be Commissioner of Baseball, and met with the owners.

1004 And when he came out, one of his friends said, why would you even consider a job like that?

1005 You would be the handmaiden to 28 of the most out of control egos in the world. And

1006 Mitchell said, well that would be a 72 percent reduction from my current job.

1007 And of course what happens is people put holds on, and Leaders protect them. And

1008 when you do not protect them--I thought Trent Lott was a terrific Leader, but when he ran into

1009 trouble he did not have a safety net deep enough, because I think some of his colleagues

1010 resented the fact that he did work to make the trains move on time.

1011 Now, Leaders can do a lot more. We are going to get an interesting test to this

1012 perhaps now with Senator DeMint. My inclination would be to say, go to the floor, go 24

1013 hours, and make him stay there. If he wants to object and deny unanimous consent, then that

1014 is what he is going to have to do.

1015 And I would like to see whether his colleagues, the overwhelming Majority of whom

1016 think that this is, even though there is a reason to want to have some time to look at things, not

1017 the best way to go, will protect him. But I doubt very much that that will happen.

1018 Now if we could have the change in the way Leaders operated with their members, and

1019 the members said I will give up some of my individual prerogatives to protect the good of the

1020 institution, I would be delighted with that and it might obviate the need for many of these rules

1021 changes.

1022 But going back to where we started, I am afraid we are going to get a bunch of people

1023 coming into this body, probably more than 20, a Majority of whom would never even consider
1024 something like that as being within their universe.

1025 Chairman Schumer. Thank you. Senator Durbin.

1026 Senator Durbin. Thanks, both of you for your testimony. And I can recall that when I
1027 was first elected to the Senate in 1996, and sworn in in 1997, I ran across Howard Metzenbaum
1028 at an event, who had recently left the Senate. And he kind of pulled me to his side, put his
1029 arm on my shoulder and said, you got to know the Senate rules. And you got to realize, that if
1030 you do not care if they hate--I am going to clean this up a little bit--If you do not care if they
1031 hate you, you can get an awful lot done in the Senate.

1032 And I did not see this in my own experience, but I am told that there were times when
1033 there were three Chairs on the floor. The lead sponsor of the Bill, manager of the Bill, the
1034 ranking Republican, and Senator Metzenbaum. And the amendments to finance Bills cleared
1035 all three desks so they did not move.

1036 And he waited, and dragged things out until in desperation Senator Mitchell or others
1037 would come to him on a Friday and say, what will it take? And he would hand them a list, and
1038 say, this is what I am waiting for. And at the end of the day, a lot of people were upset with
1039 him, but as he said, he achieved some certain things.

1040 I will say one thing in defense of Senator Metzenbaum, he was on the floor, from told,
1041 and involved in it. Now we get emails from Senators, from their staff, serving notice on all of
1042 us, that they have created something called a steering Committee, on your side. I did not

1043 realize that there was such a thing, but apparently there is.

1044 And this Senator said, our steering Committee will decided what we consider on the
1045 floor of the Senate this week. This is a staffer saying to other staffers, so please refer anything
1046 your interested in moving on the floor to us, or it is not going to move. This doing things by
1047 mail or remote, to me defies logic and should not be protected by this institution.

1048 Now let me go to a particular point that you raised, Mr. Paone. You talked about
1049 moving nominations. But now we are not dealing with a controversial nomination. We are
1050 dealing with a large number of non-controversial nominations, that are being subjected to
1051 filibuster. Nominations as we have noted came out with overwhelming votes, if not
1052 unanimous votes, out of Committee, and will probably have the same experience or close to it
1053 on the floor, that are being filibustered.

1054 Even if you took your approach, Marty, in terms of where you wanted to go, and you
1055 had to deal with a hundred nominations, it is impossible. Would you find any way of bringing
1056 them together, say all right, we are going to move these ten nominations unless 40 members
1057 will sign, saying that they are opposed to it? Tell me how we deal with the volume that we
1058 are being faced with, and the number of filibusters that bear no relevance to protecting the
1059 rights of the Minority which is destined to vote for them.

1060 Mr. Paone. It is, I agree, it is a difficult problem. Trying to bundle nominations
1061 together, however I can feel Senator Byrd rolling in his grave right now, because we would
1062 sometimes talk to him about, well can you maybe bundle some together in one cloture motion

1063 or something like that. And he would point out that you could have individuals in that bundle
1064 that someone may want and others may not.

1065 So it is difficult to bundle nominations because each one is unique. But again, you
1066 have to, maybe you cannot get them all done, make better use of the clock. Quite frankly,
1067 you may end up in a situation--I am not in favor of it, I worked for the Democrat side, but if the
1068 House flips in the upcoming election then next year you may not have too much in the way of
1069 legislation going back and forth between Houses then you may have a lot of time to spend on
1070 nominations.

1071 So they will need to be done in a drawn out basis. Some of these nominations, yes the
1072 Administration was a little slow in sending them up. And yes, due to some obstruction, you do
1073 have a large backlog. You are just going to have to use the clock just like you did for
1074 Healthcare from Thanksgiving to Christmas.

1075 Senator Durbin. I understand what you are saying, but when you look at even taking a
1076 day or two for each nomination, if--And I think there will be some who will be hell bent on
1077 exercising the filibuster on everything, controversial or non-controversial--It is just physically
1078 impossible. It makes the Senate not an institution to be respected for its principles, but a
1079 dysfunctional institution which apparently is not even committed to principle.

1080 If ultimately the Minority is going to vote for the nominee, then we are not protecting
1081 the rights of the Minority with the rules that enshrine the right of some person to make it too
1082 days instead of two hours to vote on that nomination.

1083 That to me--I do not think we bring respect on the institution nor give ourselves a
1084 functioning role in this important process. Thank you all very much for your testimony.

1085 Mr. Ornstein. If I could add Senator Durbin?

1086 Senator Durbin. Of course.

1087 Mr. Ornstein. I am sorry, Senator Alexander left. But I plead with you next year to
1088 really work on changing the broken nomination and confirmation process. It is damaging to
1089 the fabric of governance. We have large numbers of positions that are unfilled. Now two
1090 years into an Administration. A good part of the problem is an Administration that had moved
1091 them too slowly, but much of it is in the Senate. And there are a lot of things that need to be
1092 cleaned up.

1093 But if we are going to make some changes to streamline things, I would turn first to the
1094 nomination process. And as I suggested a little bit earlier, I would be happy if you could move
1095 it to a two-fifths bar for nominations alone. I think those are different. And the way in
1096 which people get held hostage by individuals and the way in which the process now gets used
1097 to use up precious time for no appropriate purpose is just not good for the Senate or for the
1098 country.

1099 Senator Durbin. Thank you.

1100 Chairman Schumer. Senator Udall.

1101 Senator Udall. Thank you Chairman Schumer, and thank you very much to this panel.

1102 I think this has been a great panel, I think it has been very enlightening. And you have

1103 explored a lot of issues.

1104 And I would like to take off, Mr. Ornstein, from where you did, talking about
1105 governance. Because that is the thing that worries me the most. I worry about the Senate
1106 as an institution, but then I worry, if the Senate is not working as an institution, then we are not
1107 doing the things the American people sent us here to do.

1108 And we really right now have a broken institution. You talked about nominations.
1109 Apparently, the judicial Conferences said 44 of these judicial nominations are emergencies, and
1110 we cannot get them done, we do not have the time.

1111 On the Executive side, I am used to an era when my Dad went into the Cabinet, that you
1112 had your team in the first couple of weeks. Apparently a year after this Administration was in
1113 office, they only had 55 percent of their Executive team in place. I do not know how you run a
1114 government under those kinds of situations.

1115 It has been pointed out on the appropriations process, and Mr. Paone, you know this
1116 well, in the Senate we get to offer amendments on appropriations. So that is an important
1117 role. It is something that, you are almost like you are an appropriator. You do not have
1118 quite the detail.

1119 This year, the remarkable thing has happened, no appropriations. So the major thing
1120 that we do in government, to keep the government running, to make the government efficient,
1121 to do that oversight, to hold those hearings and then to bring that Bill to the floor, we have not
1122 done any appropriations Bills and we're going to kick it over until December. So a sixth of the

1123 year will be gone. And that hurts the ability of government to do the things that I think the
1124 American people want it to do.

1125 Authorizations, once again, major departments need to have that oversight. We used
1126 to do--my memory is on authorizations--we used to do at least Defense and Intelligence. This
1127 year we have not done those. And we had a vote on that.

1128 And then, the House has passed, I think it is now the numbers counting and adding up
1129 every day almost 400 Bills that we have not dealt with. And all of this, and then the other
1130 issues that Norm, you, and Marty and others mentioned, I mean, Food Safety, Education, Jobs
1131 Bills, I mean, the list goes on and on and on. And many of those are contained in the House
1132 Bill.

1133 So I see us as a broken institution that is not performing for the voters. And we need
1134 to break through that, and I think your panel has proposed some ideas. But, none of these
1135 ideas are going to be, and I think you have asked the question, going to be able to be put in
1136 place unless we take the constitutional option. I do not see us having 67 votes.

1137 And believe me, I want to protect the right of the Minority to be heard, but I do not, as
1138 Senator Byrd said, want them to govern. The Minority should not be put in a governing
1139 situation.

1140 And Mr. Chairman I would ask unanimous consent to put my opening statement in the
1141 record, because there was a part of that when it came, this opening statement when it came to
1142 the motion to proceed, Senator Byrd was for that. He was for that. He came before our

1143 Committee and said he was for sensible change. And he would like to limit debate on that.

1144 And actually in 1979 when he was the Majority Leader, took the Senate floor and said
1145 that unlimited debate on the motion to proceed, and I quote, quote here, “makes the Majority
1146 Leader and the Majority party the subject of the Minority, subject to the control and will of the
1147 Minority.”

1148 Senator Byrd was very powerful on that point. And despite the moderate change that
1149 Senator Byrd proposed, limiting debate on a motion to proceed to 30 minutes, it did not have
1150 the necessary 67 votes to overcome a filibuster.

1151 So we are really–

1152 Chairman Schumer. Without objection, your statement will be put into the record.

1153 Senator Udall. Thank you, Mr. Chairman. Senator Byrd, and he argued, you know the
1154 67 votes at the time, Senator Byrd argued that a new Senate should not be bound by that rule,
1155 stating, “the Constitution in Article 1, Section 5, says that each House shall determine the rules
1156 of its proceedings. Now we are at the beginning of a Congress, the Congress is not obligated
1157 to be bound by the dead hand of the past.” That is what we have done. We have bound
1158 ourselves by rules that were passed in a previous Congress.

1159 And so I have used all my time here, but I do want to try to ask a question. And I hope
1160 you will give me, Mr. Chairman a little bit of leeway. To me, there is something that brings
1161 accountability. And I know Marty, I wrote down your words here, those are, irreparable harm
1162 to the body. It is like a dagger in my heart.

1163 But anyway, I am not trying to bring irreparable harm. There is to me a certain
1164 accountability to adopt rules every two years when you have a Congress. And I am not saying
1165 throw out all the rules. I am saying, let us be accountable. We hide behind, now, we hide
1166 behind the rules and say, oh we cannot change them.

1167 We are all now talking reform. And I hope we have, I really want Republicans to join
1168 us. The preferable thing to me would be to get the 67 votes and to move forward. But if we
1169 do not have that, we have the responsibility to govern.

1170 Don't you see a certain accountability in adopting rules every two years, under the
1171 Constitution, on the first day of a session? As far as I know, all legislatures do that.
1172 Parliaments do that, people do this around the world, they do it here in the United States.
1173 And I think that as long as we have respect for the institution and for the Minority to be heard,
1174 that this will bring accountability to the process.

1175 And that is what--I do not view this as something that is sweeping aside. It makes us
1176 accountable, and then everybody knows, well hey if we abuse the rules, if you abuse the rules,
1177 then they can be changed two years from now.

1178 Please go ahead. And sorry for running on so long there.

1179 Chairman Schumer. Please take your time.

1180 Senator Udall. All of these speakers got me all geared up here.

1181 Chairman Schumer. And you have--Senator Udall you have done a great job. You
1182 have increased awareness of this issue, you are the one who suggested these hearings to begin

1183 with. Take as much time as you want.

1184 Senator Udall. Mr. Chairman, you have done an excellent job too in putting these
1185 together.

1186 Mr. Paone. First of all, I would like to at least step back a moment. Everyone is
1187 talking about the broken system. This Congress will go down in history as probably one of the
1188 more productive Congresses in generations. You all have done extraordinary work, even with
1189 a broken system. Lilly Ledbetter. TARP. Stimulus. Healthcare. Financial Services.
1190 Two Supreme Court Justices.

1191 These things take time. And they sucked time away from the authorizations and
1192 appropriations. Of course, one of the other reasons you do not have an appropriations Bill
1193 done is you did not do a budget. You cannot have one without the other. Let us face it,
1194 without the budget, the appropriations process flows a lot more slowly.

1195 Now, as far as--and I did not use irreparable harm lightly. I did not mean, that you take
1196 it as a dagger. My only point is I look at things through the prism of, if I was still here in the
1197 Minority, what would be my reaction?

1198 Now, I fast forward to January. I am in the Minority. You are still in the Majority, a
1199 smaller Majority than you have now probably. You use the constitutional option by Majority
1200 vote to change the rules in violation of your own rules. Rule 5 says they continue, and you
1201 cannot change them except in accordance with the rules. You have changed the rules using
1202 that option, and you even just said yourself, every two years we should adopt our own rules.

1203 Well, that is fine, if that is the body you want to be. That is what the House does. So
1204 fast forward another two years, I am the Secretary for now the Majority. We have taken the
1205 place back. I am going to use your template to yes change those rules. Only I am not going
1206 to be nice and say, all we are taking away is the motion to proceed. I am going to say that
1207 whatever Bill comes up shall be, and whatever nomination, whatever comes to the floor for
1208 debate, shall be debated under the strictures as dictated by the Rules Committee. And the
1209 Rules Committee ratio shall be two-thirds majority, one-third minority.

1210 And so you as an individual member will have just lost all your power to affect change.
1211 Because you will not be able to object to things coming up. You will not be able to put holds
1212 on things or be able to filibuster something. You as an individual member will then be
1213 another House member only in a smaller body.

1214 And that is why I am afraid that if you go this route, it will be used down the road. And
1215 if every two years the Majority changes. If that is what happens, if that is what the end result
1216 of the Senate is going to be in the future, so be it. It is your call and ultimately you will have to
1217 answer to the folks, the voters. But that is my concern, it is similar to what Senator Dodd
1218 voiced, and I think Senator Byrd voiced in his last meeting here.

1219 Chairman Schumer. Senator Ornstein--I mean, you are almost a Senator.

1220 Mr. Ornstein. That is quite all right, thanks.

1221 Chairman Schumer. Mr. Ornstein.

1222 Mr. Ornstein. Just a couple of quick comments. One is of course, when this was tried

1223 in 1975, it brought enough of a jolt to the system that it actually forced bipartisan compromise.
1224 And in an ideal world for me, we achieve a bipartisan compromise before we ever get to that
1225 point. If it happened in a way that forced a bipartisan compromise, I would prefer that to no
1226 change at all.

1227 I would note that I am not sure that disaster occurred. If we could wave a magic wand
1228 and go back to having Majority required to change the rules, there is actually some restraint
1229 that is placed on both sides. If you know that it is going to be very easy to implement your
1230 own changes, if the Majority changes. So I do not think that it brings Armageddon.

1231 But in the culture that we have now, I think Marty has got a point. Doing this would
1232 cause enormous inflammation out there. And it would be so much better if we could find a
1233 way to preserve the rights of the Minority and streamline the process to keep rogue individuals
1234 or even attempts at obstruction for obstruction's sake from occurring, and find two-thirds who
1235 would be willing to do it.

1236 And I would hope that most of our efforts would be devoted to that purpose, and we
1237 would not have to turn to what--I think there is some sound constitutional reason to believe
1238 that a body cannot bind itself permanently into the future, but it is not a desirable course if we
1239 can avoid it.

1240 Chairman Schumer. Senator Bennett has a final comment.

1241 Senator Bennett. Yes. Norm, that is why they called it the Nuclear Option. I was
1242 there when it was being discussed, and it came up with the phrase, the Constitutional Option to

1243 put a soft glow around it. But I think it was Trent in a moment of candor, for which Trent is
1244 known, and for which he paid, said, you do that and it is like setting off a nuclear bomb. That
1245 is the nuclear option.

1246 And Marty, I think you are exactly right that you go in that direction. Yes, I think the
1247 Constitution can be described in a way that says you have the right to do it, but just because
1248 you have the right to do it does not mean it is the right thing to do.

1249 And I had not thought it through in the way you have, in that, okay we will escalate here
1250 and here and here. But I think you are exactly right, that is what we will do. And if I may,
1251 Mr. Chairman?

1252 Chairman Schumer. Please.

1253 Senator Bennett. I remember in our Conference a judge, and I do not remember who
1254 it was, we had the Majority but President Clinton was the President, and the judge was put
1255 forward, and our Majority was such that we were not going to be able to prevent this particular
1256 judge from going forward.

1257 And a group of people within the Conference, very upset, well we have got 41 votes
1258 against him, we do not have enough to defeat him. But we have enough people in the
1259 Republican Conference to say, we have got 41 votes against him, let us filibuster him.

1260 And the person who said, absolutely not, was Trent Lott. Because, he said, we do not
1261 filibuster judges. And if we were to do that, we would change the culture of this place. We
1262 just do not filibuster judges. That is not what you do.

1263 And the Chairman of the Judiciary Committee, my senior and colleague, Senator Hatch,
1264 said, absolutely we do not do that, because we are going to win the Presidency in 2000, and if
1265 we filibustered this judge, that means they could filibuster some of our judges.

1266 And so the younger members who had the bit in their teeth about, let us start
1267 filibustering judges, kind of stood down, and that judge went through. I have no idea who it
1268 was, I have no memory.

1269 And when the decision was made to filibuster Miguel Estrada, that change took place.
1270 And we have all heard on the Senate floor when President Obama was sending up some
1271 nominees, and my friends on the Democrat side were saying now, quoting Mitch McConnell,
1272 you do not filibuster judges, because filibustering judges is the wrong idea. And Mitch said,
1273 you are right, I said it, I believed it, but you changed things and I am now playing by your rules.

1274 And that is the best example I can think of, of what would happen if you used the
1275 constitutional option or the nuclear option to start turning around, fooling around with the
1276 rules. A future Minority Leader who became a Majority Leader or vice versa, would say, I may
1277 have said that in the past, but this is where I stand now, and you have changed the rules.

1278 Mr. Paone. Can I respond?

1279 Chairman Schumer. Please.

1280 Mr. Paone. Far be it from me to get into a judicial nomination discussion here, but in
1281 that era, when you are in the Majority, President Clinton was in the White House, you did not
1282 have to filibuster judicial nominees, you just did not report them out of Committee.

1283 And historically, it is not the first time a judge was filibustered. Abe Fortas was denied
1284 his Chief Justiceship on the Supreme Court as a result of a filibuster. By the way, it was on a
1285 motion to proceed. In those days you could still filibuster a nomination on a motion to
1286 proceed. He failed to get cloture on a motion to proceed, he then withdrew his nomination
1287 because there was a filibuster against that Supreme Court nomination.

1288 And there were two judges. Ninth Circuit judges, Paez and Berzon, that Senator Lott,
1289 good to his word, I have to hand it to him, committed to call those up as a result of other
1290 negotiations. And he called them up and we did get them confirmed. But we did have to
1291 invoke cloture on both of those circuit nominations because there were filibusters on each of
1292 those two judges. We did get cloture and those two are on the Ninth Circuit. But I just
1293 wanted to clarify some of that.

1294 Chairman Schumer. I would just make one other point here. And this is for another
1295 hearing, and we are going to have to break. We got to vote at noon I think.

1296 But one of the differences that might have happened, even in the last ten or fifteen
1297 years -- I am not sure if this is true -- the Leader whether it is a Minority Leader or Majority
1298 Leader has less desire, less ability, call it what you will, to tell a small group of recalcitrant
1299 Senators, to stop.

1300 And what we find on this aisle is many of our Republican--on this side of the aisle--many
1301 of our Republican colleagues tell us they do not like what somebody will do on the other side in
1302 terms of blocking, but there are always 41 votes there to protect their right to do it. And I bet

1303 15 or 20 years ago there might not have been.

1304 So that is another element of this, that we got to think about.

1305 Bob?

1306 Senator Bennett. I will just for the record disagree with your interpretation of what
1307 happened to Abe Fortas. I was here when it happened and I do not think he was killed by a
1308 filibuster.

1309 Mr. Paone. There was a cloture vote.

1310 Senator Bennett. They went through a procedure but that is not why he did not get on
1311 the court.

1312 Chairman Schumer. We will not have another hearing on the Abe Fortas nomination.

1313 I thank our witnesses. Very informative. I thank both Senators Udall and Bennett.

1314 And the others who participated.

1315 Hearing is adjourned.

1316 [Whereupon, at 11:54 a.m., the committee was adjourned.]